

EXHIBIT “D”

Plaintiff and Appellant,

Sup. Ct. No. 30-2008-00104237

v.

FREMONT REORGANIZING
CORPORATION et al.,
Defendants and Respondents.

**** REMITTITUR ****

I, Stephen M. Kelly, Clerk/Administrator of the Court of Appeal of the State of California, for the Fourth Appellate District, Division III, do hereby certify that the decision entered in the above-entitled cause on May 20, 2010, has now become final.

 Appellant ☒ Respondent to recover costs
 Each party to bear own costs
 Costs are not awarded in this proceeding
 See decision for costs determination

Witness my hand and the Seal of the Court affixed at my office this July 20, 2010.

Stephen M. Kelly
Clerk/Administrator

By: Lee H. Hylleberg

Deputy Clerk

cc: All Counsel (copy of remittitur only, Cal. Rules of Court, Rule 8.272(d).)

EXHIBIT "E"

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE
COURT OF APPEAL-4TH DIST DIV 3
FILED
AUG 27 2010

ROBERT SWEETING,
Plaintiff and Appellant,

Deputy Clerk _____
G043281

Sup. Ct. No. 30-2008-00104237

v.

FREMONT REORGANIZING
CORPORATION et al.,
Defendants and Respondents.

ORDER

Appellant's motion to recall the remittitur is DENIED.

RYLAARSDAM, J.

Acting Presiding Justice

cc: See attached list

 **COPY**

G043281

Sweeting v. Fremont Reorganizing Corporation et al.

Superior Court of Orange County

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____ Client Doc ____ Correspondence
____ Discovery ____ General

1777 8 2010

____ Law & Motion ____ Legal Research
____ Notes / Memos ____ Pleadings
____ Other

EXHIBIT “ F ”

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

FEB 10 2010

ALAN CARLSON, Clerk of the Court

N. Dorfman
BY N. DORFMAN

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7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF ORANGE, CENTRAL JUSTICE CENTER - UNLIMITED**

10
11 ROBERT SWEETING,

12 Plaintiff,

13 v.

14 JASON KISHABA, an individual; SANDRA
15 JAQUEZ, and individual, PETER SAUERACKER,
an individual, INTERNATIONAL MORTGAGE,
16 INC.; CAITLIN CHEN, an individual; FREMONT
INVESTMENT AND LOAN, INC.; GMAC
17 MORTGAGE LLC.; all persons unknown, claiming
any legal or equitable right, title, estate, lien or
18 interested in the property described in the complaint
adverse to plaintiff's title, or any cloud on
19 plaintiff's title thereto and DOES 1 through 25,
inclusive,

20 Defendants.

Case No.: 30-2008-00104237

Assigned for all purposes to:
Judge: Hon. Randell L. Wilkinson
Dept. C-25

**DEFENDANT GMAC MORTGAGE,
LLC'S NOTICE OF DEMURRER AND
DEMURRER TO PLAINTIFF'S SECOND
AMENDED COMPLAINT**

17 Date: March 24, 2010
Time: 1:30 p.m.
Dept.: C-25

Trial Date: November 2, 2009
Discovery Cut-off: October 5, 2009
Motion Cut-off: October 5, 2009

Action Filed: March 20, 2008

21
22 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

23 PLEASE TAKE NOTICE that on March 24, 2010 at 1:30 p.m., or as soon thereafter as the
24 matter may be heard in Department C-25 of the above-entitled Court, located at 700 Civic Center
25 West Drive, Santa Ana, California, Defendant GMAC Mortgage, LLC ("GMACM") will demur to
26 Plaintiff's Second Amended Complaint. This Demurrer is brought on the grounds that the Second
27 Amended Complaint is uncertain and Plaintiff fails to state sufficient facts to constitute any causes
28 of action against GMACM. (Cal. Civ. Code § 430.10(e-f).)

1 This demurrer is based on this Notice, the attached Memorandum of Points and Authorities;
2 the Request for Judicial Notice, upon all papers and pleadings filed herein, and upon such other oral
3 and further materials as may be properly presented at or before the time of the hearing on the
4 Demurrer.

5
6 DATED: February 9, 2010

WOLFE & WYMAN LLP

7
8 By: *Samantha Lamm*
9 STUART B. WOLFE
10 SAMANTHA N. LAMM
11 Attorneys for Defendant
12 GMAC MORTGAGE, LLC

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W
WOLFE & WYMAN LLP
ATTORNEYS & COUNSELORS AT LAW

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|--|---------|
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| <u>Code of Civil Procedure § 430.10(e)</u> | 1, 2 |

DEMURRER TO COMPLAINT

Defendant GMAC Mortgage, LLC hereby demurs to the Second Amended Complaint by Plaintiff Robert Sweeting as set forth below:

Demurrer to Fifth Cause of Action

(Reformation of Contract)

1. The fifth cause of action for reformation of contract fails to state facts sufficient to constitute a cause of action against moving Defendant under California Code of Civil Procedure § 430.10(e).

Demurrer to Sixth Cause of Action

(Breach of Contract)

2. The sixth cause of action for breach of contract fails to state facts sufficient to constitute a cause of action against moving Defendant under California Code of Civil Procedure § 430.10(e).

Demurrer to Ninth Cause of Action

(Cancellation of Written Instrument)

3. The ninth cause of action for cancellation of written instrument fails to state facts sufficient to constitute a cause of action against moving Defendant under California Code of Civil Procedure § 430.10(e).

Demurrer to Tenth Cause of Action

(Wrongful Foreclosure)

4. The tenth cause of action for wrongful foreclosure fails to state facts sufficient to constitute a cause of action against moving Defendant under California Code of Civil Procedure § 430.10(e).

Demurrer to Eleventh Cause of Action

(Quiet Title)

5. The eleventh cause of action for quiet title fails to state facts sufficient to constitute a cause of action against moving Defendant under California Code of Civil Procedure § 430.10(e).

Demurrer to Twelfth Cause of Action

(Business and Professions Code § 17200)

6. The twelfth cause of action for violation of Business and Professions Code § 17200 fails to state facts sufficient to constitute a cause of action against moving Defendant under California Code of Civil Procedure § 430.10(e).

Demurrer to Fourteenth Cause of Action

(Defamation and Tortious Interference with Credit)

7. The fourteenth cause of action for defamation and tortious interference with credit fails to state facts sufficient to constitute a cause of action against moving Defendant under California Code of Civil Procedure § 430.10(e).

Demurrer to Fifteenth Cause of Action

(Accounting)

8. The fifteenth cause of action for accounting fails to state facts sufficient to constitute a cause of action against moving Defendant under California Code of Civil Procedure § 430.10(e).

WHEREFORE, Defendant prays for judgment as follows:

1. That Defendant's Demurrer to the Second Amended Complaint is sustained without leave to amend;
2. That judgment is rendered in Defendant's favor, and
3. That Defendant is awarded costs of suit and such relief the Court deems just and proper.

DATED: February 9, 2010

WOLFE & WYMAN LLP

By: 

STUART B. WOLFE
SAMANTHA N. LAMM
Attorneys for Defendant
GMAC MORTGAGE, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the Second Amended Complaint, Plaintiff Robert Sweeting attempts to relitigate the same causes of action and issues that were adjudicated in the prior First Amended Complaint. Since the Court granted summary judgment in Defendant GMAC Mortgage, LLC's ("GMACM") favor, the doctrine of res judicata and collateral estoppel bar Plaintiff from rehashing the same causes of action and issues in the Second Amended Complaint.

II. STATEMENT OF FACTS

On March 24, 2008, Plaintiff filed a First Amended Complaint against GMACM and asserted the following causes of action against GMACM for: (1) negligence, (2) negligent misrepresentation, (3) fraud / intentional misrepresentation, (4) conspiracy to commit fraud, (5) cancellation of written instrument, (6) temporary restraining order / preliminary and permanent injunction, (7) breach of fiduciary duty, (8) quiet title, (9) breach of contract, (10) violation of Business and Professions Code § 17200, (11) breach of good faith and fair dealing, (12) violation of Truth In Lending Act ("TILA"), and conversion.¹ GMACM demurred to Plaintiff's complaint. On June 25, 2008, the Court sustained GMACM's demurrer to the sixth cause of action for temporary restraining order / preliminary and permanent injunction, the seventh cause of action for breach of fiduciary duty, and the eleventh cause of action for breach of good faith and fair dealing without leave to amend. The Court sustained the demurrer to the second cause of action for negligent misrepresentation, third cause of action for fraud / intentional misrepresentation, fourth cause of action for conspiracy to commit fraud, fifth cause of action for cancellation of written instrument, tenth cause of action for violation of Business and Professions Code § 17200, and thirteenth cause of action for conversion with 10 days leave to amend. The Court over ruled the demurrer as the first cause of action for

¹ See Plaintiff's First Amended Complaint ("FAC"), which is attached to GMACM's Request for Judicial Notice as Exhibit 1.

1 negligence, the eight cause of action for quiet title, ninth cause of action for breach of contract, and
2 twelfth cause of action for TILA violation.²

3 GMACM subsequently filed a motion for summary judgment. On October 29, 2009, the
4 Court granted GMACM's motion for summary judgment and entered judgment in favor of GMACM
5 and against Plaintiff on December 3, 2009.³ After judgment was entered in GMACM's favor,
6 Plaintiff filed a Second Amended Complaint and again named GMACM as a defendant in the
7 present action. The Second Amended Complaint is largely identical to the First Amended
8 Complaint. Both complaints arise from the same transaction and operative facts involving the
9 refinancing of Plaintiff's mortgage, servicing of the subject loan, and the subsequent foreclosure of
10 the subject property.

11 In both complaints, Plaintiff alleges that the broker/defendant, Jason Kishaba, misrepresented
12 the terms of the loan, used loan documents from different signings to complete the loan transaction,
13 and allegedly failed to provide him with copies of the loan documents.⁴ Plaintiff alleges that
14 \$40,476.92 was missing from the loan proceeds because he was suppose to receive \$65,605.36, but
15 only received \$25,128.44 of the loan proceeds.⁵ Plaintiff alleges that Defendant Fremont Investment
16 and Loan, Inc. ("Fremont") failed to properly credit and apply his payments.⁶ Plaintiff alleges that
17 Fremont then sold the loan to GMACM. Plaintiff alleges that when GMACM serviced the loan, it
18 also failed to properly credit and apply his payments to Fremont and GMACM.⁷ Plaintiff alleges
19

20
21 ² See June 25, 2008 Minute Order, which is attached to GMACM's Request for Judicial Notice as
22 Exhibit 2.

23 ³ See October 29, 2009 Minute Order; December 3, 2009 Order Granting GMACM's Motion for
24 Summary Judgment; and Judgment by the Court pursuant to CCP § 437c, which are attached to
25 GMACM's Request for Judicial Notice as Exhibits 3, 4, and 5.

26 ⁴ See FAC, ¶¶ 20-44; also see Plaintiff's Second Amended Complaint ("SAC"), ¶¶ 27-51, which is
27 attached to GMACM's Request for Judicial Notice as Exhibit 6.

28 ⁵ See FAC, ¶¶ 45-54; also see SAC, ¶¶ 52-59; 62-65.

⁶ See FAC, ¶ 56; also see SAC, ¶ 66.

⁷ See FAC, ¶¶ 57-62; also see SAC, ¶¶ 67-72.

1 that GMACM sent Plaintiff a Notice of Default on October 23, 2007. Plaintiff alleges that
2 GMACM allegedly accepted \$3,500.00 for a forbearance plan, but then rejected the forbearance
3 agreement and returned Plaintiff's payments. Plaintiff alleges that on February 26, 2008, GMACM
4 sent Plaintiff a Notice of Trustee's Sale. In an attempt to invalidate the foreclosure proceedings,
5 Plaintiff alleges that "GMAC failed to properly calculate sums due by plaintiff in relation to the
6 foreclosure of the Trust Deed, by failing to properly apply payments plaintiff made to FREMONT
7 and GMAC."⁸ Based on these allegations, Plaintiff now asserts the following causes of action
8 against GMACM in the Second Amended Complaint for: (1) breach of fiduciary duty, (2)
9 reformation of contract, (3) breach of contract, (4) cancellation of written instrument, (5) wrongful
10 foreclosure, (6) quiet title, (7) violation of Business and Professions Code § 17200, (8) defamation
11 and tortious interference with credit, and (9) accounting.

12 In the present action, there has been a final judgment on the merits. GMACM demurs to
13 Plaintiff's Second Amended Complaint because it is barred by the doctrine of res judicata and
14 collateral estoppel.

15 **III. THE COMPLAINT IS BARRED BY RES JUDICATA**

16 **A. Plaintiff Seeks to Relitigate the Same Causes of Action that This Court**
17 **Dismissed on Summary Judgment**

18 An action is subject to demurrer if it is barred by the doctrine of res judicata. (Willson v.
19 Security-First National Bank of Los Angeles (1943) 21 Cal.2d 705, 710; Olwell v. Hopkins (1946)
20 28 Cal.2d 147, 152.) The doctrine of res judicata has two features. "[T]he first is claim preclusion,
21 otherwise known as res judicata, which 'prevents relitigation of the same cause of action in a second
22 suit between the same parties or parties in privity with them.'" (Id., quoting Mycogen Corp. v.
23 Monsanto Co. (2002) 28 Cal.4th 888, 896-97.) "The second is issue preclusion, or collateral
24 estoppel, which 'precludes relitigation of issues argued and decided in prior proceedings.'" (Id.,
25 quoting Mycogen at 896.) Whether applied as a total bar to further litigation or as collateral
26
27

28 ⁸ See FAC, ¶¶ 63-67; also see SAC, ¶¶ 73-78.